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BY HAND DELIVERY

January 8, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: Comments of Sprint Communications Company L.P. on SWBT's *Ex Parte* filed December 28, 2000 in CC Dkt. No. 00-217

Dear Ms. Salas:

On December 28, 2000, Southwestern Bell Telephone Company ("SWBT") filed an amended *ex parte* presentation regarding its "voluntary agreement" to reduce some of its ostensibly TELRIC-based non-recurring rates in Kansas and Oklahoma as well as certain recurring rates in Oklahoma.¹ Sprint Communications Company L.P. ("Sprint") urges the Commission to hold fast to its requirement that all Section 271 applications be "complete when filed" and accord no weight to this new evidence.² To the extent that the Commission waives its rules and considers this evidence, Sprint alternately submits that SWBT's new rates are utterly insufficient to correct the deficiencies in its application. Finally, Sprint takes this opportunity to correct certain inaccuracies regarding its operational experience and the state of competitive entry in Kansas that appeared in SWBT's reply in this proceeding.

¹ See Comments Requested in Connection with SWBT's Section 271 Application for Kansas and Oklahoma, Public Notice, CC Dkt. No. 00-217 (CCB rel. Dec. 27, 2000) (DA 00-2912); SWBT Files Amendment to December 27th Ex Parte in Section 271 Kansas and Oklahoma Proceeding, Public Notice, CC Dkt. No. 00-217 (CCB rel. Dec. 28, 2000) (DA 00-2917).

² See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶¶ 49-54 (1997) ("Michigan Order"); Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶ 38 (1997) ("South Carolina Order").

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I. SWBT's Last Minute Attempts To Incorporate New Rates Into Its Previously-Filed Application For Section 271 Relief Are Too Little, Too Late.

The Commission's rules require that Section 271 applications, as originally filed, must "include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon."³ In assessing compliance with this rule, the Commission has previously held that "a BOC's section 271 application must be complete on the day it is filed." Michigan Order ¶ 50. In the Commission's own words, the sole exception to this requirement is "narrowly circumscribed":

A BOC may submit new factual evidence if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters, provided that evidence covers only the period placed in dispute by comments and in no event post-dates the filing of those comments. That is, a BOC is entitled to challenge a commenter's version of certain events by presenting its own version of those same events. In an effort to meet its burden of proof, therefore, a BOC may submit new facts relating to a particular incident that contradict a commenter's version of that incident. *A BOC's ability to submit new information, however, is limited to this circumstance.*⁴

Here, SWBT's "voluntary rates" do not fit within the Commission's narrowly circumscribed exception. They do not constitute factual evidence rebutting a commenter's version of an incident. Moreover, because the rates will not become available (if in fact they do become available) until some indefinite time after early January 2001,⁵ by definition, they post-date the

³ See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice, 1999 WL 766282, at *3 (CCB rel. Sept. 28, 1999) (DA 99-1994) (appended to Comments Requested on the Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Kansas and Oklahoma, Public Notice, CC Dkt. No. 00-217 (rel. Oct. 26, 2000) (DA 00-2414)).

⁴ Michigan Order ¶ 51 (emphasis in original omitted) (other emphasis added). In that order, the Commission identified three reasons that it is inappropriate to accord new factual evidence any weight. Id. ¶ 52. Although the Commission has requested comments on SWBT's new rates, at best, this extraordinary pleading cycle cures only part of the problems identified. Id. First, it does little to repair the ability of the DOJ and state utility commissions to "meet their respective statutory consultative obligations," which in turn depend on their ability to "evaluate a full and complete record." Id. ¶ 53. Second, it does not repair the ability of the Commission to "evaluate the credibility of such new information." Id. ¶ 54.

⁵ SWBT has stated the rates' availability hinges upon state approval of "either an O2A or K2A (or an amendment to an existing O2A or K2A) containing these new rates." SWBT *Ex Parte* at 2 (appended to DA 00-2917). And even if state approval is ostensibly given, there is substantial doubt as to whether the state commissions have the legal authority to accept such changes without additional state proceedings. Indeed, given SWBT's claim that the rates are below cost, it can be argued that the rates cannot be accepted at all. Who is to pay for the claimed "shortfall"? Local ratepayers? Shareholders?

filing of comments in November. “[U]nder no circumstances is a BOC permitted to counter any arguments with new factual evidence *post-dating* the filing of comments.” Michigan Order ¶ 51.

Even if the Commission were to consider SWBT’s new rates for purposes of determining its compliance with Section 271, the Commission would nonetheless find that the rates do not cure the deficiencies in SWBT’s original application. First, the Commission “must be confident that a BOC will continue to comply with the pricing requirements contained in the competitive checklist after it has been authorized to provide in-region, interLATA service.” Michigan Order ¶ 297. Where, as here, SWBT is voluntarily offering to charge rates that it claims are below costs, the Commission can have no such confidence. If SWBT in fact believes that these rates are not cost-based, it will most likely move to try to reinstate “cost-based” rates as soon as it can. Second, and more fundamentally, the Commission has no basis for concluding that any of the rates are cost-based. In fact, the record shows that they are substantially above TELRIC levels. Although required to provide “detailed information concerning how unbundled network element prices were derived,” Michigan Order ¶ 291, SWBT has simply set forth random discounts for various rates, subject to certain floors. Indeed, a comparison of the new NRC rates for those Kansas UNEs highlighted in Sprint’s comments illustrates just how random these temporary discounts are:

UNE	Texas NRC First	Kansas NRC First With voluntary change	% Higher Kansas Rate v. Texas Rate ⁶ With voluntary change	Texas NRC Additional	Kansas NRC Add'l With voluntary change	%Higher Kansas Rate v. Texas Rate With voluntary change
2W Analog Loop (zones 1-3)	\$15.03	\$23.06	53%	\$6.22	\$10.88	75%
2W Digital Loop (zones 1-3)	\$15.03	\$15.03	0	\$6.22	\$6.22	0
4W Analog Loop (zones 1-3)	\$15.03	\$47.60	217%	\$6.22	\$23.00	270%
Cross Connect, Analog Loop to Collo 2W (same CO)	\$4.72	\$17.29	266%	\$4.72	\$17.29	266%
Cross Connect, Digital Loop to Collo 2W (same CO)	\$4.72	\$17.29	266%	\$4.72	\$17.29	266%

⁶ This column reports the percentage by which the Kansas rate exceeds the Texas rate, and is computed by subtracting the Texas rate from the Kansas rate, dividing by the Texas rate, and multiplying by 100 to state a percentage. For example, where the Texas rate is \$15 and the Kansas rate is \$30, this column would report that the Kansas rate is 100% higher than (that is, twice as much as) the comparable Texas rate (($\$30 - \15)/ $\$15 \times 100\%$).

Reviewing the sampling of Kansas rates initially highlighted in Sprint's comments,⁷ SWBT's voluntary rate changes reveal at best a movement from completely outrageous to grossly excessive. For most of the elements depicted, SWBT's proposed rates decline but remain between 3 to 4 times higher than Texas rates. Only two of the proposed Kansas rates are comparable to Texas rates and the current Kansas rates for these NRCs are 5-6 times higher than the comparable Texas rates.

SWBT has also failed to satisfactorily rebut concerns raised by DOJ and others regarding the inexplicable disparities between SWBT's rates for interconnection and UNEs in Oklahoma and Kansas and those in Texas.⁸ Although SWBT attempted in its reply to respond to these criticisms, those responses, as summarized below, are unavailing:

- SWBT tried to garner support for its outrageously disparate rates in Oklahoma and Kansas by pointing to the FCC's default proxy prices for unbundled loops, which varied from state to state. SWBT noted that default rates for unbundled loops in Oklahoma and Kansas were, respectively, 14% and 28% higher than Texas. SWBT Reply at 6. Yet, as demonstrated in Sprint's comments, in some cases, the Oklahoma and Kansas rates were *hundreds of times higher* than Texas -- not 14-28% higher. Moreover, with the exception of unbundled loops, no other UNE or interconnection charges for which the Commission set default proxies varied by state.
- SWBT also invested a considerable amount of time and effort in its reply discussing possible reasons for state-to-state cost differentials, including differences in loop lengths, cost of cable placement, fill factors, and different zones alignments. *Id.* at 7-9. Yet, none of these factors explains why NRC charges (the bulk of the rates identified in Sprint's comments) or other UNE recurring charges (such as common transport for zones 1-3 in Oklahoma, which ranged from 2 to 15 times higher than comparable Texas rates) would differ so greatly from state to state.
- SWBT also claimed that the Oklahoma and Kansas NRC charges for loops are so much higher than Texas rates because Oklahoma and Kansas include a

⁷ See Petition to Deny of Sprint at 29, filed in Joint Application by SWBT for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Dkt. 00-217 (filed Nov. 15, 2000) ("Sprint Comments"). Sprint has not comprehensively compared all of SWBT's new voluntary rates to its original rates or existing Texas rates, but rather has limited its effort to the samplings contained in its initial comments. See *id.* at 29-30, 42. Sprint's review of SWBT's new voluntary rate changes for Oklahoma in comparison with the Oklahoma NRCs highlighted in Sprint's comments reveals equally disquieting results. Those voluntarily altered NRCs are 24-303% higher than SWBT's comparable Texas rates. And none of the Oklahoma NRCs discussed in Sprint's comments is to be reduced to the comparable Texas rate.

⁸ See Reply Brief of SWBT in Support of InterLATA Relief in Kansas and Oklahoma, filed in Joint Application by SWBT for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Dkt. 00-217 (filed Dec. 11, 2000) ("SWBT Reply").

so-called central office access charge (“COAC”) and a “Trip charge,” which the Texas rates do not. *Id.* at 10. But SWBT’s argument does nothing to explain why these charges are appropriate in Oklahoma and Kansas but not in Texas, and certainly does not explain how such a price difference can be justified on the basis of differences in costs.

SWBT has further complained that the Commission is attempting to set prices and is thus usurping the role of the state commissions. *Id.* at 6-7. Far from setting rates, the Commission is simply determining whether the rates at issue comply with Section 271’s competitive checklist, as it is statutorily mandated to do. SWBT’s failure to satisfactorily rebut commenters’ evidence that its interconnection and UNEs rates in Kansas and Oklahoma are not cost-based sealed the fate of this application. Neither SWBT’s reply nor its last minute “voluntary” rates can correct these deficiencies. SWBT’s application must be denied on this basis alone.

II. SWBT’s Reply Contains Several Inaccuracies That Require Correction.

In its reply, SWBT made several inaccurate or misleading statements regarding Sprint’s operational experience and the state of competitive entry in Kansas. This section corrects these statements.

A. SWBT Has Failed to Rebut Sprint’s Evidence Regarding Service Outages Due to Local Number Portability Conversions.

As discussed in the Affidavit of W. Richard Morris submitted with Sprint’s comments, SWBT’s performance measurement reports for Sprint indicate that SWBT ported 30 Frame Due Time Local Number Portability (“FDT LNP”) orders for Sprint in August and September.⁹ Of those 30 orders -- all of which occurred in Kansas City, Kansas -- Sprint’s own records show that its customers experienced service outages 23% of the time. Morris Aff. ¶ 16. Each of the orders involved an original FDT LNP order for which a supplemental cancellation order was submitted but improperly processed by SWBT. *Id.*

There are few lapses in customer service more devastating to a CLEC’s business and its reputation than an unscheduled service outage, yet SWBT’s reply failed to squarely address this serious issue. Indeed, rather than undertake a genuine effort to reconcile its own data with Sprint’s, SWBT instead offered a few cavalier responses. First, SWBT claimed that its performance data, specifically Performance Measurement (“PM”) 114 for August and September, does not document any premature disconnects for Sprint. SWBT Reply at 55. Second, SWBT argued that Sprint had not demonstrated why these outages would not be captured as premature disconnects under PM 114. *Id.* Third, SWBT contended that other record

⁹ See Petition to Deny of Sprint, Affidavit of W. Richard Morris ¶ 16, filed in Joint Application by SWBT for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Dkt. 00-217 (filed Nov. 15, 2000) (“Morris Aff.”).

data discredited Sprint's complaints about FDT LNP service outages. Id. As demonstrated below, each of these claims is, at best, incomplete.

The fact that SWBT's PM 114 does not reflect any premature disconnects for Sprint in August and September is hardly dispositive of whether Sprint's customers experienced service outages during FDT LNP conversions. In so arguing, SWBT turns the Section 271 burden on its head. It is SWBT's -- not Sprint's -- burden to present proof of nondiscriminatory provisioning, to explain and justify its methodologies for collecting and reporting these data, and to rebut evidence of discriminatory service. Indeed, Sprint indicated in its comments its concern that PM 114 would not in fact capture such outages. See Sprint Comments at 63. The Business Rules for PM 114 (version 1.6) indicate that it measures the "percentage of coordinated cutovers where SWBT prematurely disconnects the customer prior to the schedule conversion." Dysart Aff., Attachment E at 132. A premature disconnect, in turn, "occurs any time SWBT disconnects the CLEC customer prior to CLEC authorization." Id. Yet, here, SWBT's failure to timely process Sprint's cancellation orders likely resulted in a (mistaken) conclusion that SWBT had in fact been authorized to disconnect the CLEC customer pursuant to the original port order. If that is the case, Sprint's service outage would not fit within the definition of a premature disconnect and would not be reported under PM 114.

The fact that such outages would not have been reported under PM 114 (version 1.6) is further supported by recent revisions to that performance measurement. SWBT's Business Rules for the most recent version of PM 114 (version 1.7) define premature disconnects not as occurring prior to CLEC authorization, as version 1.6 did, but rather as occurring "prior to the scheduled start time." Dysart Aff., Attachment F at 167. Moreover, "Change[s] of the Due Date by the CLEC [that occur] less than four business hours prior to the schedule Date/Time" are explicitly *excluded* from the measurement. Id. Thus, under version 1.7, any changes to due date that occur more than four hours prior to the scheduled conversion time would appear to now be capturable by PM 114.¹⁰ However, because Sprint's August and September performance data were reported pursuant to PM 114 version 1.6 -- not 1.7 -- it would appear that these outages would not have been captured.¹¹

SWBT further claims that Sprint's allegations regarding FDT LNP service outages are refuted by record evidence. See D. Smith Reply Aff. ¶ 24. First, SWBT claims that Sprint cannot determine what percentage of outages it had, since Sprint did not know the number

¹⁰ If SWBT had undertaken the necessary reconciliation effort, it would in fact learn that *none* of Sprint's cancellations occurred within this four hour window. In each case, at least five days had lapsed from the time that Sprint submitted its cancellation order to the time that the line was reported to be out of service. Sprint is prepared to submit its business records formally into the FCC's record if deemed useful.

¹¹ This belief is further supported by SWBT's August 17, 2000 Accessible Letter (CLEC 00-155), which provides that LNP conversion outages will *not* be included in PM 114 unless certain procedures are followed. See D. Smith Reply Aff., Attachment A-1. The letter described both a detailed six step checklist for providing verbal notification of LNP service outages as well as other requirements for outages reported electronically. It is not clear what procedures, if any, governed LNP service outage reports prior to this letter.

of LNP requests it had submitted. *Id.* Yet SWBT completely ignores the fact that Sprint clearly indicated that it was relying on *SWBT's own data* to determine the number of requests during the relevant time frame. *See* Morris Aff. ¶ 16. SWBT cannot have it both ways. If, as SWBT claims, its performance data is reliable and accurate, then it cannot be heard to complain that Sprint relied on that data to determine the number of LNP requests it had submitted in August and September. If, on the other hand, SWBT's data is not reliable for these purposes, then it can hardly constitute an adequate basis for determining SWBT's compliance with the 271 checklist.

Second, SWBT claims that its performance data shows Sprint porting 28 orders in August and 2 orders in September, despite Sprint's assertion that it "instituted a temporary moratorium on porting on August 2, 2000," and "did not resume porting again until October 19, 2000." D. Smith Reply Aff. ¶ 24. Again, SWBT fails to fully appreciate the effect of SWBT's own provisioning errors and its failure to timely process Sprint's cancellation orders. It is logical that many of the cancellations that were submitted to effectuate Sprint's moratorium are precisely those orders that SWBT failed to process. Thus, it is not surprising that SWBT's records would indicate that Sprint numbers continued to port after August 2 -- since these are likely the same orders that SWBT failed to cancel! Had SWBT accurately processed these cancellations, then Sprint would not have had any numbers ported -- and thus no service outages -- after its August 2 moratorium.

B. SWBT Also Mischaracterizes The Presence Of Facilities-Based Residential Competition in Kansas.

SWBT is equally unsuccessful in its efforts to improve the record evidence that it has failed to satisfy the factual prerequisites of Track A in Kansas. Sprint, Global Crossing, AT&T and WorldCom have clearly rebutted SWBT's claims that there is any more than a *de minimis* number of residential lines served through independent facilities, as required to meet Track A. Here, again, SWBT has resorted to both mischaracterizations of the record (claiming that Sprint had a "substantial presence" in Kansas City when in fact there is sworn testimony to the contrary),¹² and to procedurally irregular attempts to "update" its application (claiming that resellers such as Birch and ionex are *now* beginning to convert resold lines to UNE-P).¹³

¹² Compare SWBT Reply at 72-73 n.45, *with* Sprint Comments at 8-10, *and* Morris Aff. ¶¶ 5-12 (explaining that at the time SWBT filed its application, Sprint was not offering an actual commercial alternative to Kansas local residential consumers).

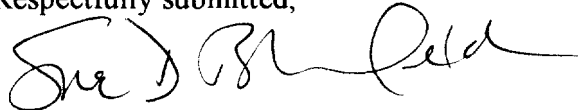
¹³ Compare SWBT Brief at 15-16 (claiming only Global Crossing and Sprint serve residential customers on a facilities basis, identifying Birch as serving residential customers "with resale service" and not even mentioning ionex), *and* Smith-Johnson Aff., Attachment F *passim* (similarly identifying only Global Crossing and Sprint as serving residential customers on a facilities basis, showing Birch and ionex (Feist) as serving residential customers through resale only), *with* J.G. Smith Reply Aff. ¶¶ 11-12 (raising argument not previously raised that UNE-P growth accompanied by decline in residential resale must necessarily equate to residential UNE-P, without addressing other plausible inferences -- most especially the commercial infeasibility of resale. SWBT also concedes that "the best source" are the CLECs themselves).

SWBT also fails to adequately explain or justify the problems raised with its methods of “estimating” competitively served customers -- notwithstanding the evidence that both methods have produced substantial errors.¹⁴ SWBT then seeks to rely ostensibly upon the determination of the Kansas State Corporation Commission, without any acknowledgement that the KCC found that a mere *five* residential customers were being served by competitive facilities. Kansas Staff Recommendation, Section I at 3 (KCC Aug. 21, 2000) (App. C, tab 259). SWBT’s selective quotes from that report do not extinguish the fundamental finding by the KCC that at the time of SWBT’s application filing, Kansas residential consumers did not have a facilities-based alternative to SWBT. In sum, SWBT has not met its burden to establish that the predicates of Track A have been met.

Conclusion

The Commission has previously recognized that “[w]hen a BOC files its application, it must demonstrate that it already is in full compliance with the requirements of section 271.” South Carolina Order ¶ 38. SWBT has not shown (nor can it show) good cause for waiver of the Commission’s rules. Under its own rules, the Commission must either rule on SWBT’s application based on the rates in place as of the date of filing or it must restart the clock. Even if the Commission were to find a waiver appropriate, as demonstrated, SWBT’s new rates do not cure the pricing deficiencies of its original application. Moreover, among other defects, SWBT has failed to rebut Sprint’s arguments regarding SWBT’s Track A showing and its discriminatory provisioning of LNP.

Respectfully submitted,



Sue D. Blumenfeld

A. Renée Callahan

Attorneys for Sprint Communications Company L.P.

cc: Attached service list

¹⁴ J.G. Smith Reply Aff. ¶ 10 (conceding Global Crossing must be correct that it has no residential customers in Kansas notwithstanding E911 database numbers reported by SWBT); *id.* ¶ 6 (accepting Sprint’s numbers as correct without any explanation as to their disparity with SWBT’s “estimates”).

CERTIFICATE OF SERVICE

I, S. Anna Sucin, do hereby certify that copies of the foregoing Comments of Sprint Communications Company L.P. on the December 28th, 2000 *ex parte* filing of Southwestern Bell Telephone Company, CC Docket No. 00-217, were hand-delivered on January 8, 2001, unless otherwise indicated, to the following parties:

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